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No. 95-974

In The

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

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BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

TO THE HONORABLE SUPREME COURT:

Respondent Maria-Kelly F. Yniguez respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Arizonans for Official English and Robert D. Park.

OPINIONS BELOW

The statement contained in the Petition is adequate[1] with the following correction:

> The District Court's decision on the merits, reported at 730 F.Supp. 309 was rendered in 1990 (not 1989).

STATEMENT OF THE CASE

The operative facts are set forth in the opinions below with one noteworthy exception – the opinions below do not mention the State's binding factual admission that it has "no legitimate purpose in restricting" Ms. Yniguez' non-English speech in the course of her performing government business. Appendix at 1-2. With this addition, the complete facts are contained in the lower courts' opinions.

[1] Contrary to the express requirements of Rule 14.1(i)(ii), *Rules of the Supreme Court of the United States*, the Petitioner's Appendix does not contain the opinions reported at 939 F.2d 727 (9th Cir. 1991) and 130 F.R.D. 410 (D. Ariz. 1990).

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED IN THE PETITION ARE NOT SUPPORTED BY THE FACTS.

At issue is Article XXVIII of the Arizona Constitution, a singularly oppressive *ex ante* prohibition that forbids elected and appointed officials, judges and all state employees from using any language other than English during any performance of government business. The Article is not restricted to "official speech" and "official acts" as the Petition suggests throughout. Rather, its prohibitive sweep is much broader, encompassing all speech in the government workplace. Only by misconstruing and ignoring the literal language of Article XXVIII can the Petition's "Questions Presented" be reached. A fair reading of Article XXVIII both vitiates those questions and demonstrates the impropriety of certiorari.

A. Article XXVIII Is A Unique Blanket Prior Restraint.

The Petition intimates that certiorari should be granted because "Official Language" legislation is "common" and the issues raised in the case below are likely to recur. Nothing could be further from the truth. Although official language legislation is not particularly unusual, the sweeping prohibitions of Arizona's Article XXVIII are singularly unique. The Article is not uniform legislation. There is no similarly worded counterpart in any jurisdiction. It is completely atypical and totally dissimilar from other official language legislation. Its prohibitive provisions were aptly described by one author as "by far the most restrictively worded official-English law to date."

M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol. 325, 337 (1991).

Unlike other official language legislation, Article XXVIII does much more than simply require that "English be used to perform official acts" as the Petition urges. No existing legislation other than Article XXVIII totally bans the use of any non-English language by "all government officials and employees during the performance of government business." No official language law apart from Article XXVIII precludes elected and appointed officials, including the judiciary, from selecting the language they deem appropriate to perform their jobs. No other legislation acts as a wholesale prior restraint on non-English speech by government employees.[2] No other statute known places limits on the speech rights of democratically-elected representatives. Only Article XXVIII is so prohibitive.

Because its provisions are so unique, the judicial construction given to Article XXVIII neither impacts any other official-English legislation nor otherwise invites this Court's attention.

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[2] *See e.g.*, Ark. Code Ann. § 1-4-117 (identifying the state's official language along with the state bird, state tree, and state folk dance); Ill. Code § 460/20 (identifying the state's official language with the provisions for the state mineral, state slogan, and state song); N.D. Cent. Code § 54-02-13 (identifying the state's official language as well as the state fossil, state grass, and state beverage).

B. The State Admitted It Had "No Legitimate Purpose" In Precluding Ms. Yniguez From Speaking Spanish As She Did On The Job.

The Petition omits key facts central to the issues decided below. For example, it was stipulated as a matter of fact that, in performing her job, Ms. Yniguez spoke only the most appropriate language required to effectively communicate with her audience. Appendix at 7. She spoke English to people who spoke only English, Spanish to those speaking only Spanish, and an appropriate combination of the two to those who were bilingual. *Id.* Moreover, it was a stipulated fact that Ms. Yniguez' use of Spanish in the performance of "government business contributes to the efficient operation" and "administration of the State." Appendix at 8. Indeed, this contribution to efficiency was not confined to Ms. Yniguez' speech alone. It was also stipulated that the efficient operation and administration of the State is enhanced by permitting all State service employees to communicate with citizens in non-English where appropriate. *Id.* These factual stipulations, binding on Petitioners, are studiously ignored in the Petition. *See United States v. California Coop. Canneries*, 279 U.S. 553, 556 (1929) (holding that an intervenor takes the case as he finds it). Finally, these stipulated facts were buttressed by the State's *Fed.R.Civ.P.* 36 binding factual admission that: "[T]he State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business." Appendix at 2.

The impact of these facts on any First Amendment analysis is self-evident. It also explains why these facts

are ignored in the Petition. This is not a case where a disgruntled employee seeks to force a language choice on her employer. Rather, it presents a case where the State, for no legitimate reason, seeks to gag the speech of all of its employees and prevent the free flow of information to, and from, its citizens.

C. The Petition Mischaracterizes The Operative Facts.

The Petition is replete with misstatements of material fact, significant omissions, and distortion of the record below. Correction of these inaccuracies underscores the propriety of denying certiorari.

Illustrative of the Petition's mischaracterization of the record is the statement that Ms. "Yniguez testified that some of those [malpractice claim] settlement forms were drafted in Spanish without English translations." Petition, p. 2. The Petition apparently proceeds from this premise to assert: "Ms. Yniguez wanted to write her claim release forms in a language her supervisor couldn't understand." *Id.* at 14. The latter statement is false and the premise on which it is based was specifically withdrawn at trial. The precise testimony on which the Petition relies was recognized at trial by all parties to have been factually erroneous. It was corrected by a factual stipulation that English translations indeed existed in Ms. Yniguez' files. That stipulation was expressly accepted by the trial court:

> MR. CHING: Okay. In regard to [stipulation] number two, number two was necessitated because in the cross-examination of Miss

Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

> "QUESTION: Okay. And is there also an English version of it on file?
>
> "ANSWER: No."

What happened after that is that Miss Yniguez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

> THE COURT: Very well. Stipulation is accepted.
>
> * * *
>
> MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not – which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.
>
> THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

Appendix at 4-5. The record thus refutes the Petition's intimation that Ms. Yniguez sought to evade supervision.

Additionally, akin to its failure to advise the Court of the factual matters set forth in subparagraph B above, the Petition omits at least two other material facts bearing on the decisions below. First, the Petition omits mention of the stipulated fact that, before passage of Article XXVIII, Ms. Yniguez spoke both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. Appendix at 8. This fact provides substantial support for the decisions below. After passage of Article XXVIII, Ms. Yniguez ceased speaking Spanish in the workplace altogether because of what the District Court found to be a "legitimate sensitivity to the perils imposed by the Article's language and her desire to restrict her conduct to that which is unquestionably safe." *Yniguez v. Mofford*, 730 F.Supp. 309, 315 (D.Ariz. 1990); Appendix to Petition for Writ of Certiorari (hereinafter "Petitioners' Appendix") at 108a. Speech by government employees on matters of public concern is plainly afforded certain protections under the First Amendment. It was just such speech by Ms. Yniguez that the District Court found was chilled by Article XXVIII.[3] *Id.*; Petitioners' Appendix at 101a-102a.

The second material omission is the Petition's failure to acknowledge the testimony of Jaime Gutierrez, a bilingual Arizona State Senator. Senator Gutierrez testified he

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[3] The Petition asserts that the District "Court did not find that Yniguez's own constitutional rights were abridged." Petition at 4. In fact, the District Court actually found that "Yniguez has met the requirement of injury in fact" due to the threat of enforcement of Article XXVIII against her by then Governor Mofford and the "chilling nature" of the Article. *Yniguez v. Mofford*, 730 F.Supp. at 312; Petitioners' Appendix at 102a-103a.

feared being sued by private citizens (under Section 4 of Article XXVIII) for speaking in Spanish to his Spanish-speaking constituents. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (9th Cir. 1995); Petitioners' Appendix at 6a. This uncontroverted testimony directly supports the Ninth Circuit's overbreadth conclusions. The Petition should have referenced it.

D. The Petition Mischaracterizes The Underlying Opinions.

The Petition's analysis of the decisions below is no more evenhanded than its analysis of the facts. By employing a carefully redacted quotation, the Petition creates the misimpression that the District Court found that "anyone could use any language that he or she chose in the performance of their jobs." Petition at 3 and 4. No such finding was made, nor can such a finding be fairly adduced. The District Court, like the Court of Appeals, simply recognized that First Amendment protection extends to the speech of state legislators, judges, and government employees commenting on matters of public concern. *Yniguez v. Arizona*, 730 F.Supp. at 314; Petitioners' Appendix at 107a. The truncated quotation contained in the Petition omits the three specific examples the District Court selected to illustrate the unquestionably protected nature of certain categories of state employee speech – speech that Article XXVIII unambiguously and unlawfully restricts. Indeed, the District Court expressly disavowed any finding of a purported "right" of a government employee to speak a language of choice. *Id.*; Petitioners' Appendix at 106a. The Petition's

suggestion that the decisions below create an unfettered new employee right of language choice is wholly unfounded.

Moreover, although the Petition also claims that the Ninth Circuit found that an employee has a constitutional or statutory right to "force language choice on an employer," Petition at 12, that claim is also unfounded. In truth, the Court of Appeals expressly rejected any such right:

> The group [Arizonans for Official English] contends that appellees seek the right to speak another language at will and regardless of whether the intended recipient of the speech primarily speaks that language or is even able to comprehend it. However, such a "right" would be of a far different order than the right at issue here. As the facts show, Yniguez spoke Spanish with Spanish-speaking claimants and English with English-speaking claimants. She does not claim any right to "choose" to speak Spanish with claimants who would not understand her, nor would this or any other court uphold such a right. Accordingly, in the interests of clarity, we emphasize that by ruling that the state cannot unreasonably limit the use of non-English languages, we do not imply that the state is therefore forced to allow inappropriate or burdensome language uses.

Yniguez v. Arizonans for Official English, 69 F.3d 920, 943 (9th Cir. 1995); Petitioners' Appendix at 46a-47a.

The Petition's assertion that the Court of Appeals found a "constitutional right to government services in languages other than English" is similarly unfounded.

Petition at 11. The Court of Appeals made no such finding. In fact, it expressly rejected the identical contention below:

> In the case before us, there is no claim of an affirmative right to compel the state to provide multilingual information, but instead only a claim of a negative right: that the state cannot, consistent with the First Amendment, gag the employees currently providing members of the public with information and thereby effectively preclude large numbers of persons from receiving information that they have previously received. Such a claim falls squarely within the confines of traditional free speech doctrine, and is in no way dependent on a finding of an affirmative duty on the part of the state.
>
> The clearest example of the distinction between affirmative and negative rights may be seen in the case of a state legislator who may seek office and be elected in part because of his ability to speak with his constituents in their native languages. No one could order such an official to speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his district in whatever language he deems to be in the best interest of those he was elected to serve.

Id. at 936-37 (citations omitted); Petitioners' Appendix at 32a-33a. Invalidation of a gag order is not the equivalent of forcing speech. The Petition's contention that the decisions below have spawned a new constitutional right to force multi-lingual government services is without merit.

Finally, the Petition claims that six purported "new First Amendment doctrines" result from the decision below. Petition at 14-15. The Ninth Circuit's decision creates no new doctrines. The purported new doctrines set forth in the Petition are merely disingenuous paraphrasings of portions of the Court of Appeals' opinion – portions not essential to the ultimate holding. The Courts below simply held that Article XXVIII is facially and unconstitutionally overbroad. The propriety of this holding is stated with clarity in Judge Brunetti's concurrence:

> Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary political speech but because it attempts to manipulate the political process by regulating the speech of elected officials.

Id. at 950; Petitioners' Appendix at 62a.

Article XXVIII was declared unconstitutional following settled First Amendment case law pronounced by this Court. No broad new doctrines were created or espoused and no issues were raised that merit imposing on the scarce time resources of this Court.

II. THE OPINIONS BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT.

The Court of Appeals' opinion carefully analyzes relevant decisions of this Court in considering the First Amendment implications of Article XXVIII. It reexamines cases dating as far back as the 1920s in which this Court

invalidated laws restricting the use of non-English languages. In doing so, the Court of Appeals acknowledges the importance of "the American tradition of tolerance, a tradition that recognizes the critical difference between encouraging the use of English and repressing the use of other languages." *Id.* at 923; Petitioners' Appendix at 3a. In affirming the unconstitutionality of Article XXVIII, the Ninth Circuit expressly adhered to the principles established in *Meyer v. Nebraska*:

> In deciding this case, therefore, we are guided by what the Supreme Court wrote in *Meyer*:
>
> > The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.

Id. at 923-924 (citing *Meyer*, 262 U.S. 390, 401 (1923)).

The Ninth Circuit reviewed the District Court's determination that Article XXVIII is unconstitutionally overbroad by applying this Court's long-standing test for overbreadth. It properly applied the *Broadrick v. Oklahoma* rule that a regulation will be invalidated on facial overbreadth grounds only where "its overbreadth is both real and substantial judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that will cure its constitutional infirmity." *Id.* at 931 (referencing *Broadrick*, 413 U.S. 601, 613, 615 (1973)); Petitioners' Appendix at 21a. In other words,

a substantial number of instances must exist in which a challenged provision violates the First Amendment before it is found to be unconstitutional. *Id.* at 932; Petitioner's Appendix at 22a. Having found numerous respects in which Article XXVIII violates the First Amendment, the Ninth Circuit agreed with the District Court that the Article should be stricken on overbreadth grounds. That opinion is entirely consistent with *Meyer* and *Broadrick*.

The Petition also asserts that the Ninth Circuit failed to properly apply *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ___, 132 L.Ed.2d 700 (1995) . The Ninth Circuit opinion, however, gives thoughtful consideration to these cases and finds that no conflict is presented. *Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioners' Appendix at 40a-41a. Both the Petition and Judge Kozinski in his dissent misperceive the applicability of *Rust* and *Rosenberger* to this case. Both the Petition and Judge Kozinski contend that Article XXVIII is a proper exercise of governmental power because the "government may write the script when it is the speaker." *Id.* at 963; Petitioners' Appendix at 92a. The problem with this contention is that Article XXVIII does not affect only speech where the government is the speaker. It goes much further. It unambigously affects private speech entitled to First Amendment protection. The Article acts as a prior restraint on the speech of elected officials, judges, and state employees where the First Amendment prohibits the government from "scripting" speech. Article XXVIII also restricts all speech of government employees in the workplace, whether or not they are speaking as

citizens on matters of public concern.[4] Of course, this Court has repeatedly held that speech by a public employee as a citizen on matters of public concern cannot be "scripted." *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 572-74 (1968). *Ex ante* restrictions on plainly protected speech are a world apart from the restrictions addressed in *Rust* and *Rosenberger*. *See Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioner's Appendix at 40a-41a.

Moreover, in both *Rust* and *Rosenberger*, as the Ninth Circuit noted, this Court recognized that the government has broad – though not unlimited – power to regulate the government-subsidized speech of private parties. In *Rust*, this Court addressed government subsidized speech by private parties carrying out government programs. Among other things, this Court focused on the fact that the subsidy recipient was not compelled to operate under the government program and that the restricted information could be received elsewhere. *Id.* at 199 n.5; 114 L.Ed.

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[4] Because Article XXVIII resulted from an initiative referendum, there is no legislative history. In such circumstances, courts may resort to publicity pamphlets accompanying the ballots to determine intent. *Bussanich v. Douglas*, 152 Ariz. 447, 450, 733 P.2d 644, 647 (Ct.App. 1986). An "argument 'for' " Article XXVIII submitted to the voters manifested the intended broad reach of the Article:

> Passage of [Article XXVIII] will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in home, churches or among friends in the private workplace.

Appendix at 11. The plain inference from this argument is that non-English conversations among friends in the public workplace, including conversations protected by the First Amendment, are prohibited.

2d at 259 n.5. Unlike *Rust*, this case does not involve government subsidies of private programs. Furthermore, in this case, recipients of government services have nowhere to turn for government information except to people like Ms. Yniguez. Thus, this case does not present the alternatives and choices that were so important to the Court's analysis in *Rust*.

Rosenberger, similarly, involved government subsidized speech – this time by private parties pursuing private goals. In determining that the governmental restriction at issue violated the First Amendment, this Court stated that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 515 U.S. at ___, 132 L.Ed.2d at 715. The *Rosenberger* decision cited *Rust* for the proposition that: "[w]hen the government *disburses public funds to private entities to convey a governmental message*, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the *grantee*." *Id.* at ___, 132 L.Ed.2d at 718 (emphasis added). Because Article XXVIII goes far beyond impacting only government speech or governmental messages the Ninth Circuit correctly found *Rust* and *Rosenberger* to be irrelevant. *Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioners' Appendix at 40a.

In sum, no one doubts the government's power to deliver a particular message or to regulate the content of its own speech. Conversely, all agree that government workers are not deprived of all First Amendment rights

simply by virtue of their employment status.[5] The analysis consistently used by this Court to weigh the competing interests of the government and its employees in regulating speech is the *Connick-Pickering* balancing test.[6] There is nothing revolutionary or novel about the Ninth Circuit's opinion. Here, the well-established *Connick-Pickering* test is studiously applied by the Ninth Circuit to a unique set of facts. Review of that analysis is unnecessary and would squander this Court's resources.

The Ninth Circuit analysis is also completely consistent with this Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L.Ed.2d 964 (1995). *Treasury Employees Union* declared that even relatively minimal prior restraints on government employee speech create such sweeping impediments that the *Connick-Pickering* test used to evaluate a *post hoc* restriction is too lenient. *Id.* at ___, 130 L.Ed.2d at 979-80. Rather, where the government seeks an *ex ante* prohibition of employee speech – as Article XXVIII does – it must satisfy a heightened burden which evaluates not only the interests of the government employees in speaking freely, but also the

[5] No court has ever held that public employees have no First Amendment rights when they are speaking in the course of their duties. Rather, courts have found First Amendment protection available even to speech made as part of one's job duties. *See e.g., Williams v. Kentucky*, 24 F.3d 1526 (6th Cir. 1994); *Koch v. Hutchinson*, 841 F.2d 1436, 1442 (10th Cir. 1988).

[6] *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (employing a balancing test that weighs the interest of the employee in speaking on matters of public concern against the government's interest in promoting efficiency).

interests of possible recipients of those communications. *Id.* at ___, 130 L.Ed.2d at 980-81 The Ninth Circuit noted: "*National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's 'right to receive information and ideas' by affording First Amendment protection to speech that the public has an interest in receiving." *Yniguez v. Arizonans for Official English*, 69 F.3d at 942; Petitioners' Appendix at 44a.[7]

III. THE PROCEDURAL POSTURE INVITES DENIAL OF THE PETITION.

A. Alternative Grounds For Invalidation Of Article XXVIII Were Preserved.

Because both the District Court and the Ninth Circuit concluded that Article XXVIII violates the First Amendment, neither court reached the additional constitutional and statutory grounds raised by Ms. Yniguez for invalidating the Article.[8] In his dissent, Judge Kozinski recognized that additional proper grounds may exist for invalidating the Article XXVIII:

> This is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVIII makes it

[7] As a part of her duties, Ms. Yniguez resolved petitions by citizens with grievances against the State. Communicating such grievances is itself constitutionally protected speech. U.S. Const. amend. I.

[8] Substantial facts were adduced at the trial court level establishing, *inter alia*, the disparate impact of Article XXVIII on discrete ethnic minorities.

> harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No court has yet considered these arguments, which go more directly to the heart of this dispute.

Id. at 963; Petitioner's Appendix at 92a.

These issues would necessarily have to be resolved by the trial court should this Court grant the Petition and reverse the judgment. The resulting potential for relitigation and lack of finality in a case which has been pending for more than seven years militates heavily against granting the Petition.

B. Reversal Would Result In Inconsistent Judgments.

Then Governor Rose Mofford of Arizona, the only defendant bound by the District Court judgment, did not appeal that decision.[9] As a result, the judgment is final as to her and her successors in any action against Ms. Yniguez. *See Yniguez v. Mofford*, 939 F.2d 727, 737 (9th Cir. 1991). Reversal by this Court would result in two diametrically opposed final judgments in this action. Such an undesirable situation should be avoided.

[9] Moreover, the State of Arizona neither petitioned this Court for certiorari nor did it join in the instant petition. Because this is a case under 42 U.S.C. § 1983, the Petitioners' peculiar interests in furthering their own objectives coupled with the lack of participation by the State of Arizona makes this case an unsuitable vehicle for reviewing the decisions below.

IV. THE PETITION'S TENTH AMENDMENT ARGUMENT WAS NOT RAISED BELOW.

After five years of appellate-level litigation, for the first time in these proceedings[10] the Petition raises an argument based upon the Tenth Amendment and notions of federalism. It is inappropriate, in a petition for writ of certiorari, to raise an issue not raised before.[11] *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. ___, 132 L.Ed.2d 650, 659 (1995) (stating "[w]hatever the fact may be, the case was not presented and decided [using a First Amendment analysis]. The record facts before us and the opinions below address only the Establishment Clause issue; that is the question upon which we granted certiorari; and that is the sole question before us to decide.")

[10] Also, for the first time, the Petition suggests that Article XXVIII should not be struck down in its entirety. Petition, p. 21. This suggestion is completely contrary to the Petitioners' consistent position below. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 933 (9th Cir. 1995). ("[T]he parties before the court have never treated Article XXVIII as anything other than a single entity that must stand or fall as a whole.")

[11] Petitioners had numerous opportunities to raise the issue by, *inter alia*, filing a complaint in intervention, briefing the issue to the three-judge Ninth Circuit panel, requesting consideration of the issue in their suggestion for rehearing *en banc*, or in their supplemental brief on rehearing. They did none of these.

V. CONCLUSION.

Article XXVIII is singularly unique among official language statutes. The atypical factual background of this case does not invite review. The opinions below create no conflicts with existing case law. They are correct, well-reasoned and wholly-consistent with applicable precedent. Further review is not warranted.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERTK. [sic] CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants.	**CIV NO. 88-1854 PHX PGR** ANSWERS TO **PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION**

To: Defendants Rose Mofford, Robert K. Corbin and Catherine Eden and their attorney, Robert K. Corbin, Attorney General and Anthony Ching, Solicitor General

Pursuant to Rules 26, 33 and 36, *Fed.R.Civ.P.*, Plaintiff requests that Defendants answer in writing and under oath, within thirty (30) days from the date of service hereof, or within such other time as may be ordered by

the Court, the following non-uniform interrogatories and requests for admissions:

* * *

REQUEST FOR ADMISSION NO. 18: Admit that the State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business.

Admit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIE-KELLY F. YNIGUEZ, et al.,	)	No. CIV-88-1854-PHX-PGR
Plaintiff,	)	Phoenix, Arizona
vs.	)	April 27, 1989
STATE OF ARIZONA, et al.,	)	9:33 A.M.
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

APPEARANCES:

For the Plaintiffs:	Pohlman & Sanders, P.A. By: ROBERT J. POHLMAN, Esq. 2525 E. AZ Biltmore Cir., #220 Phoenix, Arizona 85016
For the Defendants:	Office of the attorney general By: ANTHONY B. CHING, Esq. 1275 W. Washington Phoenix, Arizona 85007-2997
Court Reporter:	William A. Mc Nutt, III, RPR 230 N. First Ave., Room 7404 Phoenix, Arizona 85025 (602) 253-0707

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

MR. CHING: Okay. In regard to number two, number two was necessitated because in the cross-examination of Ms. Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

"QUESTION: Okay. And is there also an English version of it on file?

"Answer: No."

What happened after that is that Miss Yniguez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

THE COURT: Very well. Stipulation is accepted.

(MARIA-KELLY F. YNIGUEZ, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN)

* * *

REDIRECT EXAMINATION

BY MR. POHLMAN:

* * *

Q. And the communication of the governmental act of settling the claim is communicated between claimant in what manner?

A. It can be communicated verbally, in whatever language the claimant understands.

Q. Can -- how about by way of document?

A. I can also communicate it by letter. I can communicate it verbally.

Q. The files that Mr. Ching had you look at after the last hearing, was there a file in which there was a release in Spanish that was signed?

A. Yes. There was one file in which the release, the signed document was in Spanish. I did provide a translation of that document and placed it in the file so that anyone that had to look at the file for whatever reason and was not able to read the Spanish version could know what was contained within. The signed document was in Spanish.

* * *

MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not -- which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.

THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

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MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants.	**CIV NO. 88-1854 PHX PGR** **PLAINTIFF'S AND DEFENDANTS' STATEMENT OF STIPULATED FACTS**

The parties stipulate that in addition to the pleadings, other evidence and documents on file, the following facts are deemed uncontested and may be used by this Court as evidence subject only to relevancy objections:

• • •

8. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are

Kelly's two natural languages. Kelly thinks in both languages and in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage.

• • •

11. If Kelly issues an order denying, settling or approving a claim, she is governed by Article XXVIII and must act only in English.

• • •

13. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both languages. Some of the persons with whom she communicated in a combination of the Spanish and English languages were persons whose command of the English language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgement and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas.

14. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal settlement documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern.

15. Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State and to the efficient administration of the State.

16. The efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.

17. The efficient administration of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.

* * *

20. The State of Arizona has adopted specific standards governing the conduct of State Service employees, violation of which "is cause for discipline or dismissal of a State Service employee." Some of these standards are

embodied in Arizona's Administrative Rules and Regulations, including A.C.R.R. R2-5-501.

21. Employees of the State of Arizona who fail to obey the laws of the State of Arizona may be subjected to discipline or dismissal.

22. The regulations of the State of Arizona which require State service employees to comply with State laws and regulations require compliance with the Constitution of the State of Arizona as a part of the laws of the State.

23. The Director of the Department of Administration, Catherine Eden, is responsible, directly or indirectly through persons appointed by the Director, for the enforcement of personnel rules of the State of Arizona.

24. The Department of Administration has the power to impose employment sanctions on Kelly if, in the Department's opinion, she has violated a law, including Article XXVIII.

25. Maria-Kelly F. Yniguez is required by her employer to obey the Constitution and laws of the State of Arizona.

ARIZONA

PUBLICITY PAMPHLET

"THE CHOICE IS YOURS"

Propositions to be submitted to the
qualified electors of the State of Arizona
at the

GENERAL ELECTION
NOVEMBER 8, 1988

GREAT SEAL OF THE
STATE OF ARIZONA
1912

COMPILED AND ISSUED
BY JIM SHUMWAY
SECRETARY OF STATE

ARGUMENT "FOR" PROPOSITION 106

If the United States is to remain a great nation of which we can all be proud, we must have only one official language. We can enjoy many different traditions, cultures, races and languages. However, we must have only one official language for governmental purposes. Without the unifying force of one official language, divisiveness and conflicts are certain to develop.

All patriotic citizens in Arizona will be making a significant contribution toward maintaining our country as a leader in the world of nations when they vote YES on Proposition 106 as an amendment to our state Constitution.

When Arizona citizens cast a YES vote on Proposition 106 it will NOT be denying any non-English speaking person the right to have: 1) an interpreter in an election booth, or: 2) an interpreter in any police action or criminal court of law.

Passage of Proposition 106 will not eliminate bilingual ballots in any official state, county or local elections where required by federal law.

Passage of Proposition 106 will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in homes, churches or among friends in the private workplace.

Passage of Proposition 106 will permit the continued promotion of bilingual education on all levels of learning in our state where required by federal law.

Passage of Proposition 106 will not eliminate bilingual public notices for the health and safety of our citizens.

The main reason for Proposition 106 is to guarantee that official governmental business, including documents drawn at the state level, as well as business and those documents drawn for all political subdivisions such as counties, cities and towns, shall be valid, effective and enforceable only if conducted and written in the English language.

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Former Superintendent of
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